No. 308

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 25 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

NO. 20,032

JEFFERSON DAVIS BROADUS and
JOE CURT COLEMAN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

ALTO V. WATSON
WATSON AND SELMAN
207 F & M Building
Beaumont, Texas
Counsel for the Petitioner

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

SUBJECT INDEX

	Page
Nature of the Case and Jurisdictional Statements	1
Questions Presented and Reason Why Certiorari Should be Granted	2
Constitutional Provisions Statutes and Rules of The Supreme Court Involved	4
Statement of the Case	4
A. The Original Case	4
Conclusion	7
Appendix A-1 (Motion to Revoke Probation of Jefferson Davis Broadus, R. 50-53)	9
Appendix A-2 (Motion to Revoke Probation of Joe Curt Coleman, R. 53-60)	11
Appendix A-3 (Court Reporter's Transcript of Court's Decision After Completing Revocation Hearing on September 19, 1962, R. 25-39)	18
Appendix A-4 (Opinion of the Court of Appeals, R. 326-330)	31
Appendix A-5 (Judgment of the Court of Appeals, R. 331)	35
Appendix A-6 (Petition for Rehearing, R. 333-337)	36
Appendix A-7 (Judgment Overruling Petition for Rehearing, R. 334)	40
Appendix B (Testimony of John O. Berry—including the tape recording, R. 250-254)	41
Appendix C-1 (Title 47 U.S.C.A. Sec. 605)	46
Appendix C-2 (Title 28 Sec. 1254 (1) U.S.C.)	47

Page

Appendix C-3 (Proposed Amended Rule of Criminal Procedure 32(f) 47

Appendix C-4 (Amendment IV Constitution of the U. S.) 47

Appendix C-5 (Amendment V Constitution of the U. S.) 48

LIST OF AUTHORITIES

CONSTITUTION OF THE UNITED STATES

Amendment Four 3
Amendment Five 3

STATUTES

26 U.S.C. 5601(a)(7), 5205(a)(2), 5179(a), 5173 4
47 U.S.C.A. 605 3, 4, 6

RULES OF CRIMINAL PROCEDURE

Rule 32(f) (Proposed) 3, 4, 6

CASES

Carnes v. United States, 295 F.2d 598, cert. den. 369 U.S. 861 3
Esco v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 3, 4, 6
Nardone v. United States, 302 U.S. 379, 58 Sup. Ct. 275, 82 L.Ed. 314 3, 7
Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 3
Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 3
United States v. Polakoff, 112 F.2d 888 3

IN THE

Supreme Court of the United States

NO. 20,032

JEFFERSON DAVIS BROADUS and
JOE CURT COLEMAN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

To The Honorable Supreme Court of The United States:

Nature of the Case and Jurisdictional Statements

Jefferson Davis Broadus and Joe Curt Coleman jointly pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the respective judgments of the Trial Court revoking the probation of each petitioner. The petitioners were originally tried on a single indictment charg-

ing, in effect, a conspiracy to defraud the United States of Internal Revenue Taxes by distilling and possessing sugar intended to be used for the distillation and possession of un-tax-paid liquor (R. 2-8). The petitioners were given identical sentences of a $2,000.00 fine (which has been paid) and a prison sentence of 3 years, suspended for a period of 5 years, conditioned upon good behavior and each petitioner was placed upon active probation (R. 18-21). These judgments were filed March 27, 1961. On motions of the probation officer against petitioners jointly, and copied in Appendix "A" because material to this appeal, petitioners were jointly tried for revocation of probation, and judgments so revoking probation were duly entered September 19, 1962. The Trial Court did not write an opinion but did announce an opinion from the bench which appears in Appendix "A" because material to this appeal. Appeal was timely taken to the Circuit Court of Appeals for the Fifth Circuit and judgment and opinion, which is not yet reported, was entered May 22, 1963, affirming the judgments of the Trial Court. Petition for re-hearing was timely filed and denied June 27, 1963. Petition for stay of mandate was timely filed and granted July 8, 1963. This petition for certiorari is timely filed on or before July 27, 1963. The jurisdiction of this Court is invoked under Sec. 1254 (1), Title 28, United States Code.

Questions Presented and Reason Why Certiorari Should Be Granted

1. Whether a government agent can institute a long distance interstate telephone call, record the conversation by tape recording without warning to the other party, and without the consent and over the proper objection of the

other party play the tape recording in evidence to procure the revocation of probation of the other party?

The Court of Appeals says "yes" in reliance in its own decision in *Carnes v. United States*, 295 F. 2d 598, cert. denied 369 U.S. 861. This decision is in conflict with prior decisions of this Court in *Nardone v. United States*, 302 U.S. 379, 58 Sup. Court 275, 82 Lawyers Ed. 314; *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L. Ed 307; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319; and the decision of the Court of Appeals for the Second Circuit in *United States v. Polakoff*, 112 F. 2d 888. This decision is also contrary to the plain provisions of Title 47 U.S.C.A., Sec. 605. It violates both the Fourth Amendment and the Fifth Amendment to the Constitution of the United States. First, Second, Third Grounds, Petition for Rehearing (R. 334-335).

2. Whether a probationer is entitled to "due process of law" as provided by the Fifth Amendment to the Constitution of the United States to the extent that he is entitled to be "apprised of the grounds on which such action (revocation of probation) is proposed." Rule 32 (f) of the proposed amendments to the Rules of Criminal Procedure of this Court as declaring the law of the land expressed in *Escoe v. Zerbst*, 295 U.S. 490, 55 S. Ct. 818, 79 L. Ed. 1566.

The Court of Appeals was silent and did not pass on this point though it was specifically called to its attention; and this is a question of national importance calling for a directive by this Court on a newly proposed rule. Fourth and Fifth Grounds, Petition for Rehearing (R. 335-336).

Constitutional Provisions Statutes and Rules of The Supreme Court Involved

This case involves the Fourth Amendment and the Fifth Amendment. It also involves the Federal Wiretapping Act, Title 47 U.S.C.A., Sec. 605. It involves the proposed amendment to the Rules of Criminal Procedure of this Court, Rule 32 (f) as declaring the law of the land expressed in *Escoe v. Zerbst*, supra. These are reproduced with the exception of the cited case in Appendix "C" of this petition.

Statement Of The Case

A.

THE ORIGINAL CASE

The petitioner Broadus, a resident of Mississippi, was arrested in the Eastern District of Texas, driving a truck loaded with 300 sacks of sugar. Out of this incident grew a single indictment charging both petitioners and one Joseph Kovatch with a conspiracy to defraud the United States of lawful Internal Revenue Taxes and to commit offenses against the United States, to-wit: Violation of Title 26 United States Code, Sec. 5601 (a) (7), 5205 (a) (2), 5179 (a) and 5173, in effect to produce and possess non-tax-paid liquor and the unregistered apparatus for doing so (R. 2-8). Kovatch was dismissed (R. 18). The petitioners were jointly tried and during trial an agreement was reached whereby Coleman withdrew his plea of not guilty and entered a plea of guilty and Broadus agreed to discharge the jury and be found guilty on his plea of not guilty by the Court. Accordingly, a judgment was en-

tered against each petitioner assessing a penalty of a $2,000.00 fine and three years confinement suspended for 5 years, conditioned on good behavior with each petitioner placed on active probation (R. 18-23).

Thereafter, and solely on evidence furnished by agents of the government set out to entrap petitioners and a civilian, Robert Emmons, who was paid partly by reward for conviction (R. 189) of bootleggers, the probation officer moved for revocation of the probation of petitioners. (Appendix "A").

On the charges of which they were apprised, the petitioners presented concrete evidence that they either did or did not commit the acts charged. The government in the motions of the probation officer and throughout made no mention of the principal charge of the claimed connection of petitioners with a "Yogi" truck and therefore a whiskey still in Pearl River County, Mississippi, made the basis of the testimony of A.T.U. agents, David W. Doyle (R. 205-220), Charles L. Campbell (R. 221-235), William E. Owens (235-243).

Therefore, a large portion of the evidence adduced against petitioners was evidence concerning acts with which they were charged at the hearing without being apprised thereof.

Petitioners quite freely admit that on the question of the credibility of the witnesses, the Court could have entered the same order. But this being a matter of the exercise of discretion, the question is whether or not the revocation of the probation of the petitioners was brought about by evidence concerning acts claimed to have been committed by them of which they were not apprised, or whether the

revocation was based upon the credibility of the witnesses on the questions of which they were apprised.

The Trial Court, in its opinion, very carefully struck from the record the complained-of tape recording. The testimony appears at Appendix "B" (R. 250-254). However, the Court in its opinion in a statement from the bench and by bench warrant, held the petitioners and their witnesses to answer for perjury based upon the testimony of the witnesses, Shaw and Nobles that Broadus was not present at the original sale of 200 gallons of whiskey and did not participate in the arrangements for the second 200 gallons of whiskey. The learned Trial Court knew that the Federal Rule requires two witnesses to establish perjury or the testimony of one witness and strong independent corroborating circumstances. The only corroborating circumstance in this case is the telephone communication intercepted by the witness, James O. Berry, and played into the record. Therefore, without question in the record, the Court did give credit to the recorded intercepted telephone communication to the prejudice of petitioners.

The law is not clear on just what type of interception and divulgence of telephone messages is prohibited by Title 47, U.S.C.A., Sec. 605. This lack of clarity is due to the conflicting opinions cited supra.

The proposed new rule 32(f) is declaratory of the law of the land as announced in *Escoe v. Zerbst*, supra and needs to be written on to clarify the question of whether a probationer is entitled to due process in revocation hearings.

The importance of the questions presented can be no better expressed than did this Court in the first *Nardone* case as follows:

> "The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt Section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution."

Conclusion

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this joint case.

Respectfully submitted,

ALTO V. WATSON
WATSON AND SELMAN
207 F & M Building
Beaumont, Texas
Counsel for the Petitioner

APPENDIX A-1

Motion to Revoke Probation of Jefferson Davis Broadus

Mr. Beighle: May it please the Court, I present the matter of Criminal No. 5372, the United States versus Jefferson Davis Broadus.

Mr. Broadus was convicted at Beaumont, Texas, by jury trial on Counts 2, 3, 4 and 5 of an Indictment alleging violation of the Internal Revenue Laws and conspiracy to defraud the government of taxes due thereof. Count 1 of the Indictment was dismissed on motion by the government.

Your Honor imposed a fine of $2,000.00, generally, on Counts 2, 3, 4, and 5, such fine to be paid into the registry of the Court by April 15, 1961. In addition, a sentence of three years was imposed on Count 5, which was suspended five years, with probation. Defendant paid the $2,000.00 fine on April 14, 1961.

Broadus returned to his home in Saucier, Mississippi. The Court of the Northern District of Mississippi issued a warrant for arrest for probation violation due to subject's conviction in this district. Such warrant was executed on June 12, 1961, and Broadus immediately released on bond. On September 21, 1961, Broadus' probation in the Northern District of Mississippi was revoked and he was fined $1,000.00, to stand committed. In addition, Broadus received a sentence of three years, with the stipulation that he serve the first four months of the sentence and the remainder would be suspended for two years and eight months, with probation. Broadus served the four months less any statutory good time earned.

Information has been furnished this office that on May 25, 1962, Broadus sold an undercover investigator agent for the government two hundred gallons of non-taxpaid whiskey and delivered the whiskey in person. Broadus received $3.00 a gallon for this whiskey, or a total of $600.-

00. The whiskey was delivered at four-thirty a.m. near the Boll Weevil Club on Highway 67, about one mile north of Saucier, Mississippi. On May 30, 1962, the same investigator called Broadus at his residence and made arrangements with him for the delivery of two hundred more gallons of whiskey to be delivered at the same place the early morning of June 2, 1962. The whiskey was delivered at approximately two-thirty a.m. by the same person who accompanied Broadus on the first delivery; however, Broadus did not accompany this load of whiskey. Government agents seized the whiskey and arrested Wetzel Shaw and the undercover agent. A third man who accompanied Shaw in delivering the whiskey escaped by running away in the darkness.

It is quite apparent to Probation Officer that Jefferson Davis Broadus did not appreciate the leniency of this Court in granting him probation. Probation Officer would suggest to the Court that Broadus merely used his freedom to continue wide-spread operations in the illicit whiskey business. The Court's attention is again directed to the defendant's lengthy record of convictions in Federal Court in Mississippi for violations of Internal Revenue Laws (whiskey) dating back to February 1949. Violations of the state and federal liquor laws resulted in nine convictions in Federal Court and several convictions in Justice of Peace Courts in Mississippi. The fact that Broadus sold two hundred gallons of non-taxpaid whiskey on May 25, 1962, to government agents and verbally agreed to deliver two hundred more gallons of non-taxpaid whiskey within a period of seven or eight days to the same agents would reveal he is still engaged in the illicit wholesale liquor business on a large scale.

Probation Officer respectfully moves this Honorable Court to revoke and set aside the suspended sentence and probation of Jefferson Davis Broadus and impose such sentence as the Court desires.

APPENDIX A-2

Motion to Revoke Probation of Joe Curt Coleman

The Court: All right. Do you have a similar motion in regard to the defendant Joe Curt Coleman?

Mr. Beighle: Yes, Your Honor.

The Court: You may present it.

Mr. Beighle: At Beaumont, Texas, on March 27, 1961, the defendant Joe Curt Coleman pleaded not guilty to five counts of an Indictment alleging violation of the Internal Revenue Laws and conspiracy to defraud the government of taxes due thereof. During the course of the trial, Coleman through his attorney, requested permission to withdraw his plea of not guilty and enter a plea of guilty to Count Five of the Indictment. The government moved to dismiss Counts One, Two, Three and Four. The Court granted the defendant's request and accepted the plea of guilty to Count Five only. Sentence imposed was a fine of $2,000.00, to be paid by April 15, 1961 and a sentence of three years, suspended for five years with probation. Probationary supervision was transferred to the Southern District of Mississippi on April 14, 1961, the same date Coleman paid the $2,000.00 fine.

In granting probation, the Court explicitly instructed both Coleman and Jefferson Davis Broadus that if any information was ever received to indicate they had reentered the manufacture or sale of non-taxpaid whiskey, the Court would have no hesitancy in revoking their probation and imposing sentence.

On October 19, 1961, Coleman was arrested by Agents of the Alcohol and Tobacco Tax Division near Long Beach, Mississippi and charged with possession of property

(sugar) intended to be used in violating the provision of Chapter 51, Internal Revenue Code, and for conspiring to violate Internal Revenue Liquor Laws. Coleman was released on $750.00 bond the following day pending grand jury action.

Circumstances leading up to this arrest are as follows: On October 19, 1961, Investigators of the Alcohol and Tobacco Tax Division interviewed George H. Byrd, a grocery store operator of Long Beach, Mississippi, in connection with the purchase of unusually large amounts of sugar. Byrd told the officers that he had sold sugar to Curt Coleman on past occasions and recently had purchased 20,000 pounds for another man who was unable to use the sugar but suggested that Byrd contact Curt Coleman. Byrd contacted Curt Coleman who agreed to purchase the sugar.

On the night of October 19, 1961, government agents were watching a residence at 629 Garden Dale Avenue, Long Beach, Mississippi. George W. Byrd's pickup truck was parked in the street in front of the house. A red GMC 1-½ ton pickup truck was backed into the yard. When the GMC pickup truck emerged from the yard, government agents pursued it about a mile and a half to where the truck failed to make a turn and crashed into a ditch. Two men jumped from the truck and were successful in escaping. In the back of the pickup under a tarpaulin were thirty-six 60 pound bales of Supreme Sugar or 2,160 pounds of sugar.

Government agents were still maintaining surveillance at the residence 629 Garden Dale Avenue, Long Beach, that night. Coleman approached the house in a 1949 green pickup truck and started to stop. He saw investigator

Doyle and immediately sped away. Investigator Doyle flashed his light on Coleman and recognized him before he was able to drive away. Officers pursued Coleman for about half a mile at a high rate of speed before stopping him. He was placed under arrest. The truck Coleman was driving was improperly licensed and registered. Coleman had a paper bag on the seat beside him which contained $720.00 in currency. He said he was not doing anything, just riding around. Coleman's residence is approximately twelve miles from this address at Long Beach, Mississippi.

The charges resulting in this arrest have not been presented to the grand jury in the Southern District of Mississippi and are still pending.

On April 13, 1962, Coleman and eleven other co-defendants were indicted in the Southern District of Alabama on charges of conspiracy to engage in an interstate non-taxpaid whiskey business. The government alleges that Joe Curt Coleman and Ernest Lins financed the business, secured supplies and materials, procured trucks and automobiles for use in distribution, selected and approved distillery sites, received orders for non-taxpaid whiskey and arranged for delivery, directed the activities of the drivers, transporters, distiller, and distillery hands, and directed the installation of distilleries at new distillery sites.

Defendant was arraigned in Federal Court, Mobile, Alabama on April 30, 1962 and through counsel entered a plea of not guilty to all counts. The case was set for trial on June 12, 1962, however the case was postponed on that date and has not been reset for trial.

Overt acts committed by the defendant in violation of the condition of his probation are as follows: On November 9, 1961 a special employee of the government, acting as an undercover agent, contacted Colemian at his residence North of Gulfport, Mississippi. The special employee was accompanied by an investigator of the Alcohol and Tobacco Tax Division. The special employee contacted Coleman for the purpose of purchasing some non-taxpaid whiskey. The special employee went into the house with Coleman while the government investigator remained outside in the government car. Coleman made several phone calls and was unable to contact anyone. Coleman then requested the special employee to accompany him, telling him that his "buddy" (the government investigator) would have to wait at the house in the car. Coleman took the special employee to a negro's house. He called this negro "Big Boy", more commonly known as "Big Boy" Bradley, and asked him if he was through with his work. "Big Boy" said that he was, with the exception of fifty barrels which he had to back up that night. Coleman then directed "Big Boy" to let the special employee have 100 gallons of non-taxpaid whiskey at $3.00 per gallon. Coleman then described the government car to "Big Boy" and told him the special employee and his "buddy" would be back in a little while to pick up the stuff. Coleman told "Big Boy" to get the money after he loaded the whiskey out.

Coleman and the special employee then returned to Coleman's house, where Coleman got out. The special employee and the government investigator then returned to "Big Boy's" house about 3:30 P.M. "Big Boy" Bradley got into a 1953 gray Chevrolet with another white man and told the special employee and the government investi-

gator to follow him. They drove down an old woods road to a building called the Boll Weevil Club and parked about 500 yards past the club. "Big Boy", along with the special employee and the government investigator proceeded to unload the whiskey from the Chevrolet into the trunk of the government car. Seven gallons of the whiskey was broken, yet there remained ninety-nine gallons of non-taxpaid whiskey in glass jugs and government investigator paid "Big Boy" Bradley $297.00 for the whiskey.

Prior to selling the 100 gallons of whiskey to the special employee, Coleman asked him if he knew where Coleman could get hold of a good supply of sugar each week. Special employee told Coleman he would find a source and call him back in a few days.

The special employee then contacted Joe Broughton, owner and operator of Broughton's grocery store in the Cross Roads Community, located about six miles southwest of Bay Minette, Alabama. Arrangements were made for Broughton to sell sugar to Coleman with the agreement that first Coleman would contact Broughton and agree upon a price per hundred for the sugar and how many tons a week he would require.

About 6:00 p.m. on the evening of November 16, 1961, Coleman, John Henry Lins and Edward McCall picked up the special employee in Mobile, Alabama and drove to Joe Broughton's home in the Cross Roads Community, Bay Minette, Alabama. Broughton could not be located on that trip. During the trip to Broughton's store, Coleman told the special employee that he had to move out of Leakesville, Mississippi in Greene County because it got too hot for him. He said that it was hard to operate anything but a small 50 or 100 barrel outfit without getting caught.

Coleman remarked that he was on probation and had to be very careful.

About 4:00 p.m. on November 18, the special employee was again picked up in Mobile, Alabama by Coleman and Ernest Lins in a 1955 or 1956 Cadillac. They drove to Joe Broughton's home and found him this time. Special employee introduced Coleman to Broughton and told him that Coleman was the man he had mentioned who wanted to purchase lots of sugar. Broughton told Coleman he could furnish between twelve and eighteen tons of sugar a week and the price would be $11.00 a hundred pounds. Coleman told Broughton he would take all the sugar he could get and would pay him for the first load if Broughton was afraid of his money. On the way back to Mobile, Alabama, Ernest Lins offered to sell whiskey to special employee delivered in Mobile, at $4.00 per gallon. Coleman told special employee to go ahead and buy from Lins as it was all the same whiskey and he could get by just as well having it delivered in Mobile for $4.00 per gallon as special employee could by picking it up in Gulfport, Mississippi for $3.00 per gallon.

These facts have been presented or the Court's information, having in mind that Coleman has not yet been convicted of the offense pending in the Southern District of Mississippi or the indictment with which he stands charged in the Southern District of Alabama.

Probation Officer strongly feels that Coleman immeditely reverted to making and selling non-taxpaid whiskey after being placed on probation by this Honorable Court on March 27, 1961 at Beaumont, Texas. By his actions one must conclude Coleman has completely disre-

garded the Court's explicit instructions to remain out of the illicit whiskey business and merely uses probation as further license to evade the law and defraud the government of thousands of dollars in taxes.

The defendant's criminal record and convictions date back to 1940 when he was first arrested and charged by Agents of the Alcohol and Tobacco Tax Division with handling non-taxpaid whiskey. Coleman has been arrested thirteen times by federal officers as to illicit whiskey operations, ten of which resulted in convictions in Federal Court.

It is believed the Court will recognize the defendant has not abided by the conditions of his probation. The purpose of probation is self-rehabilitation of the convicted offender and probation in this case has served no useful purpose.

Probation Officer moves this Honorable Court to revoke and set aside the suspended sentence of Joe Curt Coleman and impose such sentence as the Court desires.

APPENDIX A-3

COURT REPORTER'S TRANSCRIPT OF COURT'S DECISION AFTER COMPLETING REVOCATION HEARING ON SEPTEMBER 19, 1962

(Number and Title Omitted) (Filed: September 19, 1962)

THE COURT:

The Court is prepared at this time to render a judgment in this case. This is a Hearing for the purpose of determining whether or not the probation given the defendants Joe Curt Coleman and Jefferson Davis Broadus by this Court on March the 27th, 1961, should be set aside, and that the defendants be required to serve the original sentence given by the Court at that time.

The facts reveal that on March the 27th, 1961, the defendant Coleman entered a plea of guilty to an indictment pending in this Court, charging conspiracy to defraud the Government of taxes due thereon as a result of dealing in illicit liquor under the Internal Revenue Law, and on this plea of guilty, the Court found the defendant guilty and assessed punishment at a fine of $2,000.00, and a sentence of three years, suspended for five years, and the defendant Coleman was placed on active probation.

Also at the same time, on March the 27th, 1961, on an indictment pending in this Court against Jefferson Davis Broadus, the defendant Broadus entered a plea of guilty to four counts of an indictment charging various violations of the Internal Revenue Law and conspiracy to defraud the Government of tax due in connection with the illicit liquor operations, and on the plea of guilty the Court found the defendant guilty on all four counts and assessed a fine of $2,000.00, said fine to run con-

currently, and on one count, the Fifth Count, the Court also sentenced the defendant to three years confinement in an institution, which sentence was suspended and the defendant was placed on active probation.

The Court placed these defendants on probation at the time, believing that the ends of justice and the best interests of the public as well as the defendants would be subserved by this action of the Court. Subsequently, on July the 18th, 1962, a Motion was filed by the Probation Officer, requesting that a warrant be issued for these defendants, and that a hearing be held in this Court on August the 2nd, 1962 to determine whether or not the probation should be revoked, and subsequently the defendants were taken into custody and brought before this Court on August the 2nd, 1962, at which time a Motion was filed by the attorneys for the defendants, requesting a postponement of this hearing. On the defendants' Motion, the Court did continue the hearing and postponed it until September the 10th, 1962. At that time the Probation Department filed a statement in regard to each of these defendants, Jefferson Davis Broadus and Joe Curt Coleman, setting out specific violations of the law, and moved the Court to revoke the probation in regard to both of these defendants.

The attorney for the defendants, Mr. Watson, requested time to investigate these specific charges, and to give the defendants an opportunity to present evidence and witnesses to refute the charges, both specifically and generally. The Court granted this postponement and the case was reset for Tuesday of this week, September the 18th, 1962.

Now, we have attempted to give the parties a full and complete hearing in this case. The Court did this for a number of reasons. First, the Court realized that the officers who are charged with the responsibility of suppressing illicit liquor operations are very zealous in prosecuting these two defendants because of their past records, which record was presented to the Court at the time of the original trial, on March the 27th, 1961, at the time the Court sentenced the defendants. The Court realized that the officers' zealousness and their desire to bring these defendants to justice might cause an overstepping of authority. The Court felt the officers were somewhat prejudiced in regard to these defendants, and although the Motion filed by the Probation Officer, based upon information which they had, was pretty specific and exact, the Court still wanted to give the defendants an opportunity to prove that the charges were incorrect, and to refute the general conclusions that the defendants were not worthy of probation.

Further, the Court has a certain amount of pride in the trial of cases and in the disposition of criminal cases, believing that he understands human nature pretty well, and further, not wanting to be proven incorrect in his original judgment in placing these two defendants on probation and suspending their sentences of three years to five years. The Court was hoping that the defendants could satisfactorily and thoroughly refute these charges made by the Probation Officer based upon the investigation made by the Federal Officers connected with the Alcohol & Tobacco Tax Unit of the Federal Government. Also, out of a sense of fairness, the Court wanted to give the defendants the benefit of a full and complete hearing. Further, the Court had a high

regard and respect for the honesty, integrity and character of the attorneys who were representing the defendants, and the Court did not believe that these attorneys would impose upon this Court in asking him to believe something which they could not in good conscious believe, and which they would know in all fairness that the Court would not be able to believe. For all of these reasons a full hearing was conducted.

The Court understands that in a Revocation of Probation Hearing of this type that it is not necessary to go to the extent of such a full and complete trial. It is not necessary for the Government to prove specific violations of the law; specific charges. It is not mandatory that such proof be made. It is not necessary in order that the Court might revoke probation. All that is necessary is for the Court to become convinced from the evidence that the defendants have not been appreciative of the privilege — not a right, but a privilege, which the Court gave in placing them on probation. That they have not lived up to the responsibility that they have as probationers, and the only safeguard that the defendants might have in this particular would be that the Court shall not abuse his discretion in setting aside the probation and granting the revocation.

Now, the Court distinctly remembers at the time, telling these defendants, and asking the defendants if they were convinced that the Court would do what he said he would do, telling them that if the information reached the Court that they were in anywise engaging in the illicit liquor business in this state or any other state, or in violation of the laws of any state, or the Federal Law, the Court would have no hesitancy in setting aside the probation.

The Court is convinced, and the Court so finds, in regard to Joe Curt Coleman, that charges are now pending against the defendant in the Southern District of Mississippi relative to a violation of the Internal Revenue Law pertaining to illicit liquor, on or about November the 19th, 1961, and the Court finds that even though there may not be enough evidence to justify a conviction of the defendant Coleman in this particular, his conduct and actions are most suspicious and that they are such as to tie the defendant Coleman in with the charges sufficiently that the Court can conclude that he was connected with the liquor violation in this particular, the illicit liquor vlolation.

The Court further finds that there is an indictment pending in the Federal Court of Mobile, Alabama, in the Southern District of Alabama, which was filed on or about April the 13th, 1962, and the defendant Coleman was arraigned on such indictment on or about April the 30th, 1962, and that the case is now awaiting trial, also in connection with a violation of the Internal Revenue Law pertaining to the illicit liquor business. The Court feels that the facts and circumstances in connection with this case are sufficient to tie the defendant Coleman to this charge and this indictment to such an extent that the Court cannot ignore that he was engaged in the illicit liquor business on this occasion.

The Court further finds that on or about November the 9th, 1961, the defendant Coleman was instrumental and brought about the sale of some untaxed whiskey to a special employee and an investigator of the Alcohol & Tobacco Tax Unit.

The Court further finds that the defendant was closely connected and interested in the operation of a still which

was seized in Mississippi some time in March of 1962; that his conduct and actions were such as to show that he had an interest in these operations. The Court further feels that the defendant was interested in purchasing a quantity of sugar for the purpose of manufacturing illicit whiskey in November of 1961, from a witness who testified, by the nome of Broughton.

Now, these are specific finding that the Court makes in regard to the defendant Coleman's connection with violating the terms of the probation which he received in this Court on or about March the 27th, 1961. Generally, the Court feels that the defendant has not complied with the terms of the probation, and has shown too much interest in illicit liquor operations since March 27th, 1961.

Now the Court further makes specific findings in regard to the defendant Jefferson Davis Broadus. The Court finds that this defendant Broadus was instrumental and made a sale of untaxed liquor to an agent of the Government on or about May the 25th, 1962, and at such time agreed to make a subsequent sale, and at which time a subsequent sale was made by the witness Shaw. Further, a witness by the name of Noble was involved in the transaction and disappeared from the scene by running.

The Court further finds that the defendant Broadus was interested in and connected with, and participated in, the operations of a still which was seized in Mississippi on or about March the 5th or 6th of 1962, and that he has generally failed to live up to the conditions of his probation, by being engaged in the illicit liquor business, either actively, or in a passive capacity.

The Court further finds that there was no entrapment involved in the specific instances testified to by the wit-

nesses in this case; no entrapment on the part of the Government Agents.

The Court, further, has stricken from the record and has sustained defendants' motion to suppress the recording of the telephone conversation between the witness Berry and the defendant Broadus, which took place on or about the latter part of May or the first of June, of 1962.

Further the Court feels compelled, out of a sense of right, to comment that he is of the opinion that the defendants in this case are guilty of perjury; not only guilty of perjury themselves, but guilty of subordination of perjury in regard to the witnesses Shaw and Noble, and the Court will order the U. S. Attorney's Office at this time to make a thorough investigation into what the Court considers to be acts of perjury on the part of the two defendants during this hearing, and also subordination of perjury insofar as the witnesses Noble and Shaw are concerned, and the Court would further order that an investigation be made in regard to the two witnesses Shaw and Noble on the matter of perjury, and that they be placed under arrest immediately, awaiting charges to be filed by the U.S. Attorney's Office.

The Court believes that the defendants in this case have no respect or regard for authority. That they have little regard for the Court, and that they have little regard for the law. This attitude, of course, hurts the defendants more than anyone, but the Court is obligated to bring this matter to the attention of the defendants. We feel that such conduct on the part of the defendants is not only improper, but it is reprehensible, and is an attitude that the Court cannot ignore.

The Court concludes that there is no question but that the evidence offered is sufficient to show not only specific violations of the liquor laws by these two defendants, Coleman and Broadus, but there is more than enough evidence before the Court to show obviously that the spirit of the probation granted these defendants by the Court on March the 27th, 1961 was not in any sense complied with by either of the defendants. Therefore, this Court has no alternative but to grant the Petition for Revocation. It is the order of the Court that the defendant Jefferson Davis Broadus' probation be revoked. It is the order of this Court that the defendant Joe Curt Coleman's probation, granted by this Court, be revoked. The defendants Jefferson Davis Broadus and Joe Curt Coleman will rise.

Jefferson Davis Broadus, it is the order of this Court that your probation be revoked and that you be confined in a Federal Institution to be designated by the Attorney General for a period of three years. That the defendant may become eligible for parole at such time as the Board of Paroles may determine.

Joe Curt Coleman, it is the order of this Court that your probation be revoked and that you be confined in a Federal Institution to be designated by the Attorney General, for a period of three years. That you may become eligible for parole at such time as the Board of Paroles may determine.

This memorandum decision shall be considered as the findings of fact and conclusions of law herein as authorized by the Federal Rules of Criminal Procedure.

All right, Mr. Marshall, you may take the defendants. The Court will stand adjourned.

THE STATE OF TEXAS
COUNTY OF JEFFERSON

I, Allan H. Burbage, Jr., Official Court Reporter for the United States District Court in and for the Eastern District of Texas, Beaumont Division, hereby certify that the foregoing is a true, correct and complete transcript of the Court's decision in the above entitled and numbered cause, given by His Honor Joe J. Fisher, on the 19th day of September, A. D. 1962 at Beaumont, Texas.

WITNESS my official hand this the 19th day of September, A. D. 1962 at Beaumont, Texas.

/s/ ALLAN H. BURBAGE, JR.
Allan H. Burbage, Jr.
Official Court Reporter
United States District Court
Federal Building - P. O. Box 268
Beaumont, Texas

REVOCATION OF PROBATION JUDGMENT AS TO JEFFERSON DAVIS BROADUS

(Number and Title Omitted) (Filed: September 19, 1962)

The Motion to Revoke Probation filed in this cause by the Probation Officer for the Eastern District of Texas, came on for hearing and consideration on August 2, 1962, and upon the request of the defendant the hearing was postponed until September 10, 1962, at which time the Motion to Revoke was presented to the Court, and after hearing witnesses on behalf of the defendant the case was reset for September 18, 1962, at which time a full and complete hearing was had in connection with said Motion.

Now on this the 19th day of September, 1962, the Defendant having appeared in person and by his Attorneys, Honorable Bill Selman and Honorable Alto Watson, Attorneys of the Jefferson County Bar, the Court having heard the Motion presented by the Probation Officer, the evidence presented by the Defendant, and the evidence presented by the Government in support of said Motion, and the Defendant having been afforded an opportunity to show cause, if any, why said Motion of the Probation Officer should not be granted, and having considered all of the evidence presented in said case, the Court is convinced and so finds that same should be granted and that the Order heretofore entered by the Court in this cause on March 27, 1961, committing the said Jefferson Davis Broadus to the custody of the Attorney General or his authorized representative for a period of three years and Ordering the Defendant to pay a fine of $2,000.00, further Adjudging that the sentence of three years confinement be suspended and admitting the said Jefferson Davis Broadus to probation for a period of five years, should be revoked in so far as it pertains to the suspending of the execution of the sentence imposed and admitting him to probation, as aforesaid, it is, therefore,

ORDERED, ADJUDGED and DECREED that the portion of the said Order heretofore entered by the Court on March 27, 1961, suspending the execution of sentence and admitting the Defendant to probation, as aforesaid, be and the same is hereby vacated, revoked and set aside.

It is ADJUDGED that the Defendant Jefferson Davis Broadus has been convicted by jury trial on Counts 2, 3, 4, and 5 of an Indictment alleging violation of the Internal Revenue Laws, Count 1 of said Indictment having been dismissed on motion of the Government.

It is FURTHER ORDERED, ADJUDGED and DECREED that the Defendant Jefferson Davis Broadus be and he is hereby committed to the custody of the Attorney General or his authorized representative, for imprisonment in an institution to be selected by the Attorney General, for a period of Three (3) Years, to be eligible for parole at such time as the Board of Parole may determine.

It is ORDERED that the Clerk of this Court deliver a certified copy of the Revocation of Probation, Judgment and Commitment to the United States Marshal, or other qualified officer, and that such copy serve as the commitment of the Defendant.

Entered this the 19th day of September, 1962.

/s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

REVOCATION OF PROBATION JUDGMENT AS TO JOE CURT COLEMAN

(Number and Title Omitted) (Filed: September 19, 1962)

The Motion to Revoke Probation filed in this cause by the Probation Officer for the Eastern Division of Texas, came on for hearing and consideration on August 2, 1962, and upon the request of the defendant the hearing was postponed until September 10, 1962, at which time the Motion to Revoke was presented to the Court, and after hearing witnesses on behalf of the defendant the case was reset for September 18, 1962, at which time a full and complete hearing was had in connection with said Motion.

Now on this the 19th day of September, 1962, the Defendant having appeared in person and by his Attorneys, Honorable Bill Selman and Honorable Alto Watson, Attor-

neys of the Jefferson County Bar, the Court having heard the Motion presented by the Probation Officer, the evidence presented by the Defendant, and the evidence presented by the Government in support of said Motion, and the Defendant having been afforded an opportunity to show cause, if any, why said Motion of the Probation Officer should not be granted, and having considered all of the evidence presented in said case, the Court is convinced and so finds that same should be granted and that the Order heretofore entered by the Court in this Cause on March 27, 1961, committing the said Joe Curt Coleman to the custody of the Attorney General or his authorized representative for a period of three years and Ordering the Defendant to pay a fine of $2,000.00, further Adjudging that the sentence of three years confinement be suspended and admitting the said Joe Curt Coleman to probation for a period of five years, should be revoked in so far as it pertains to the suspending of the execution of the sentence imposed and admitting him to probation, as aforesaid, it is, therefore,

ORDERED, ADJUDGED and DECREED that the portion of the said Order heretofore entered by the Court on March 17, 1961, suspending the execution of sentence and admitting the Defendant to probation, as aforesaid, be and the same is hereby vacated, revoked and set aside.

It is ADJUDGED that the Defendant Joe Curt Coleman has been convicted upon his plea of guilty, after having withdrawn his plea of not guilty in this cause of the offense charged in the Indictment on file herein, and particularly in Count 5 of said Indictment, alleging violation of the Internal Revenue Laws.

It is further ORDERED, ADJUDGED and DECREED that the Defendant Joe Curt Coleman be and he is hereby committed to the custody of the Attorney General or his authorized representative, for imprisonment in an institution to be selected by the Attorney General, for a period of three (3) years, to be eligible for parole at such time as the Board of Parole may determine.

It is ORDERED that the Clerk of this Court deliver a certified copy of the Revocation of Probation, Judgment and Commitment to the United States Marshal, or other qualified officer, and that such copy serve as the commitment of the Defendant.

Entered this the 19th day of September, 1962.

/s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

APPENDIX A-4
Opinion of the Court of Appeals

NO. 20032

JEFFERSON DAVIS BROADUS and JOE CURT COLEMAN, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(May 22, 1963)

Before RIVES, and GEWIN, Circuit Judges, and SHEEHY, District Judge. SHEEHY, District Judge: This appeal is from judgments of the court below revoking probation as to the appellants, respectively, and sentencing each to imprisonment for a term of three years.

The appellants were charged in a single indictment with certain violations of the Internal Revenue laws relating to liquor. In Counts One, Two and Four, the appellant Broadus alone was charged with violations of 27 U.S.C.A. Sec. 5686 (a). In Count Three, both appellants were charged with a violation of said Sec. 5686 (a). In Count Five, the last count of the indictment, the appellants, jointly, were charged with a conspiracy to violate 26 U.S.C.A. Secs. 5601 (a) (7), 5205 (a) (2), 5179 (a) and 5173 in violation of 18 U.S.C.A. Sec. 371. On March 27, 1961, the appellant Coleman entered a plea of guilty to Count Five, and thereupon Count Three as to him was dismissed. The court then imposed on Coleman a prison sentence of three years and a fine of $2,000.00. The prison sentence was suspended for a period of five years conditioned upon the good behavior of Coleman, and he was placed on active probation for that period.

Count One of the indictment was dismissed, and on March

27, 1961, after a trial before the court on a plea of not guilty as to the remaining four counts, Broadus was found guilty as charged in each of said counts. The court then imposed a fine of $2,000.00 generally on Counts Two, Three and Four and sentenced Broadus to three years imprisonment and a fine of $2,000.00 on Count Five with the $2,000.00 fine on Count Five to run concurrent with the fine of $2,000.00 imposed on Counts Two, Three and Four. The court suspended Broadus' three year sentence for a period of five years conditioned on his good behavior and placed him on active probation for such period of time. Broadus, as well as Coleman, promptly paid the fines imposed.

On July 18, 1962, the Probation Officer of the Court below filed separate motions as to the appellants charging that each, subsequent to receiving the sentences above mentioned, had continued to engage in the illicit liquor business in certain particulars in violation of the conditions of his probation. Thereafter, after due notice to the appellants and their attorney of record, the court, on September 18, 1962, had a full hearing on said motions of the Probation Officer, with the appellants being present and being represented by their attorney. Following the hearing, the trial court found that each of the appellants, subsequent to the granting of probation, had engaged in the illicit liquor business in certain particulars and thereby had violated the conditions of his probation. Based on those findings and conclusions the trial court entered a judgment as to each of the appellants revoking his probation and sentencing him to prison for three years. It is these judgments that the appellants seek to have reversed.

Whether probation should be revoked in a particular case is within the sound judicial discretion of the court

granting it. Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266; Yates v. United States, 10 Cir., 308 F. 2d 737, and Manning v. United States, 5 Cir., 161 F. 2d 827, cert. denied, 332 U.S. 792. Thus in an appeal from an order revoking probation, the only question presented is whether the trial court abused its discretion in finding that one or more of the conditions of the probation had been violated. Burns v. United States, supra; Yates v. United States, supra; and Hensley v. United States, 5 Cir., 257 F. 2d 681.

At the hearing below the appellee called as one of its witneses a senior investigator with the Alcohol and Tobacco Tax Unit by the name of Berry who testified that he purchased 200 gallons of "non-tax paid" whiskey from appellant Broadus in Mississippi on May 25, 1962. Berry further testified that on May 30, 1962, he had a long distance telephone conversation with Broadus in which arrangements were made for him to purchase another 200 gallons of whiskey from Broadus. Berry made a tape recording of the conversation. After the tape recording was identified by Berry, same was offered in evidence. At the time it was offered in evidence, the appellants objected to same as being evidence illegally obtained in violation of 47 U.S.C.A. Sec. 605 and further moved to suppress it. The trial court overruled appellants' objections and admitted the tape recording into evidence with the understanding that appellants might later urge their motion to suppress or a motion to strike said tape recording as evidence. At the conclusion of the evidence, and before the trial court announced its judgments on the motions to revoke probation, the trial judge stated into the record in open court, in the presence of the appellants and their attorney that he was sustaining the motion to suppress

said tape recording of the telephone conversation between Berry and the appellant Broadus and that such recording was stricken from the record. Appellants vigorously contend that said tape recording was illegally obtained in violation of 47 U.S.C.A. Sec. 605, and even though the trial court struck same from the record after having heard it played, the recorded telephone conversation so poisoned the entire hearing as to cause a manifest abuse of discretion on the part of the trial court in revoking the probation of the appellant Broadus. Such contention is without merit because (1) under the holding of this Court in Carnes v. United States, 295 F. 2d 598, cert. denied, 369 U.S. 861, said tape recording was not obtained in violation of 47 U.S.C.A. Sec. 605 and, therefore, not inadmissible in evidence as being in violation of said statue, and (2) even if the admissibility of said recording were questionable, the trial court having ordered said tape recording stricken from the record, this Court will assume that he gave no consideration to it in finding that Broadus had engaged in the illicit whiskey business subsequent to receiving probation.

After having carefully reviewed the record in this case, we find and conclude that the appellants, and each of them, were given a full and fair hearing by the trial court, and that there was ample evidence to reasonably satisfy the trial court that the appellants, and each of them, enengaged in the illicit liquor business subsequent to the granting of probation. Therefore, the trial court did not abuse its discretion in finding that the appellants, and each of them, had violated the conditions of their probation and in ordering a revocation of the probation of each of the appellants. Accordingly, the judgments appealed from are

AFFIRMED

APPENDIX A-5

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 20032

D. C. Docket No. 5372 Crim.

JEFFERSON DAVIS BROADUS and
JOE CURT COLEMAN, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

Before RIVES and GEWIN, Circuit Judges, and SHEEHY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in this cause be, and the same are hereby, affirmed.

May 22, 1963

Issued as Mandate:

APPENDIX A-6
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 20,032

JEFFERSON DAVIS BROADUS and
JOE CURT COLEMAN, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the Eastern District of Texas

Honorable Joe J. Fisher, Judge Presiding

APPELLANTS' PETITION FOR REHEARING

To the Honorable United States Court of Appeals
for the Fifth Circuit:

COME NOW the appellants and each petition the Court to grant a rehearing and thereupon reverse the judgment of the Trial Court so that a fair and proper hearing on the question of revocation of the probation of each appellant may be had and as distinct grounds state the following.

FIRST GROUND

The judgment of the Court is erroneous as a matter of law in holding that the tape recording was not obtained illegally in violation of 47 U.S.C. Par. 605 in reliance on its decision in Carnes v. United States, 295 F. 2d. 598, cert. denied, 369 U.S. 861 and was admissible in evidence, in that, the judgment in the case at bar and Carnes v. United States supra are in conflict with the decisions of

the United States Supreme Court in the following cases: Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314; Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182.

SECOND GROUND

The tape recording in question was illegally obtained in violation of the Fourth Amendment to the Constitution of the United States and illegally admitted in evidence in violation of the Fifth Amendment to the Constitution of the United States and the Court in its judgment holding that the recording was legally obtained and admissible in evidence is in constitutional error.

THIRD GROUND

The assumption by the Court that the Trial Court gave no consideration to the tape recording in question is so against the weight and preponderance of the evidence as to be clearly wrong in that this is the only evidence in the record corroborating the testimony of the witness James O. Berry and the Court from the bench ordered the witnesses Shaw and Nobles held for perjury because of their testimony contrary to Berry's evidence and the tape recording; and the rule of two witnesses or one witnes and corroborating evidence is still the rule in Federal perjury cases.

FOURTH GROUND

The appellants (defendants) were not appraised of grounds on which the action of revoking their probation was proposed in that there was no mention in either of

the Probation Officer's charges of either of the appellants being connected with the operation of a whiskey still in Pearl River County, Mississippi, a YOGI truck, seized automobiles and voluminous testimony interrelated with those objects on which the Government principally relied for the revocation of the probation particularly of Joe Curt Coleman and to a large extent of Jefferson Davis Broadus resulting in a trial contrary to the law as laid down in Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1556 Model Penal Code Par. 301.4 (P.O.D. 1962); Hink, the Application of Constitutional Standards of Protection to Probation, 29 University of Chicago Law Review, 483, and as expressed in the Proposed Amended Rules of Criminal Procedure for the United States District Courts Rule 32 (f).

FIFTH GROUND

The hearing in the Trial Court was so contrary to the procedures laid down for the revocation of probation of defendants in Federal Court in Escoe v. Zerbst supra as to require a reversal of this case or the overruling of its own opinion by the United States Supreme Court.

WHEREFORE, for the grounds stated this petition should be granted and a rehearing had and upon rehearing the judgment of the Trial Court revoking the probation of each appellant be reversed for appropriate action by the Trial Court in accordance with law.

Respectfully submitted,

Alto V. Watson

CERTIFICATE OF COUNSEL

I, Alto V. Watson, attorney for Appellants, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

ALTO V. WATSON

A copy of the foregoing Petition for Rehearing has been served upon the United States Attorney for the Eastern District of Texas by depositing a copy hereof this 10th day of June, 1963, in the United States mail with proper postage thereon addressed to the United States Attorney, Post Office Box 1049, Tyler, Texas.

ALTO V. WATSON

APPENDIX A-7
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 20032

JEFFERSON DAVIS BROADUS and
JOE CURT COLEMAN, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the Eastern District of Texas

(JUNE 27, 1963)

ON PETITION FOR REHEARING

Before RIVES and GEWIN, Circuit Judges, and SHEEHY, District Judge.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

APPENDIX B

Testimony of James O. Berry Including the tape recording
R. 250 - 254

Q. All right. Now then, prior to your second delivery, state whether or not you had a conversation with Jefferson Davis Broadus?

A. Yes, I did.

Q. Was that conversation by phone, or personally?

A. It was by phone.

Q. State whether or not you made a tape recording of that phone conversation?

A. I personally recorded it, yes, sir.

MR. WATSON:

If Your Honor please, I think the witness should be warned he is about to incriminate himself under the Federal Statutes for wire-tapping.

THE COURT:

I see no necessity in warning him. I think the witness is doing pretty well.

MR. WATSON:

Well, we object to any testimony then by way of unlawful wire-tapping.

THE COURT:

Are you interested in protecting this witness from incriminating himself?

MR. WATSON:

No, sir, I don't know. He seems to be a young man. I don't know whether he knows the results of what he is testifying to, and I'll have the objection to anything that

was obtained by the illegal method of wire-tapping being introduced into a Federal Court, in violation of the Federal Wire-Tapping Act.

THE COURT:

The objection is overruled.

MR. BLALOCK:

Q. State whether or not you personally made a recording?

A. I personally made the call and the recording.

Q. State whether or not Mr. Broadus was asked by the operator to identify himself?

A. The operator asked, "Is this J. D. Broadus?", and he replied it was.

Q. Do you have the recording of that conversation with you?

A. Yes, sir, It's been in my possession since the time I recorded it.

Q. And will you exhibit it to the Court?

MR. WATSON:

May it please the Court, before it is exhibited, we would like to renew our objection, that this is a violation of the Federal Statutes, to introduce the results of any telephone wire-tapping. I would like, so I won't have to get up and object all of the time and inconven[illegible]e the Court, to have that objection ride with me throughout these proceedings.

THE COURT:

We can pass upon this matter at a later time, Mr. Watson. You may make your motion to suppress, or to strike from the record and the Court will consider the motion, however your objection at this time is overruled.

MR. WATSON:

Yes, sir. Will the Court understand that we have moved in limine before it is exhibited, or anything is played, or anything has been done about it, to suppress any such evidence that he has testified to as being obtained by telephone wire-tapping.

THE COURT:

I understand.

MR. WATSON:

Now, I would like to ask one further question, Your Honor. I may have made a mistake.

THE COURT:

Of the witness?

MR. WATSON:

I would like to correct one question with the witness.

THE COURT:

All right.

MR. WATSON:

Q. Did you warn Mr. Broadus, or whoever it was you were talking to when the recording was made, that the telephone conversation was being recorded?

A. No, I did not warn him.

Q. Did you warn him that it could be used against him in any type of proceedings?

A. No, I did not warn him.

MR. WATSON:

Thank you, Your Honor.

THE COURT:

All right. You may play it.

(At this point the witness placed the recorder on the Court's bench and the following recording was reproduced):

"May 30th, 1962. This is a recording of a phone call to Mr. J. D. Broadus, Gulfport, Mississippi.

Operator. Operator, I want to place a long distance call to Gulfport, please. Operator: All right. I want to talk to Mr. J. D. Broadus. I'm sorry, I don't have his number, but he's listed in the Gulfport directory. Yes, sir, just a moment. Moment, what? Just a moment. I have a long distance call for J. D. Broadus. (Operator): That's 8322-450. Thank you. You're welcome. (Berry) 8332150. (sound of phone ringing four times). (Operator) They don't answer sir. (Berry): I'll call again, operator. (Operator): Do you want me to re-place it for you? (Berry): Ma'am? (Operator): They don't answer, do you want me to re-place it for you? (Berry): No, that's all right.

May 30th, 1962. This is a long distance phone call to J. D. Broadus, Gulfport, Mississippi.

(Sound of phone ringing five times). Operator. (Berry) Operator, I want to place a long distance call to Gulfport, please. Operator: All right. I want to talk to Mr. J. D. Broadus at 8322450. Operator: 832—. (Berry) —2450. Operator: All right, thank you. Where are you calling from? (Berry): Calling from Atlanta. (Operator) Thank you. Sound of phone ringing three times). (Answer) Hello. Operator: Long distance calling for J. D. Broadus. (Broadus): Go ahead. (Operator): You are him? (Broadus): Yes, ma'am. Operator: Go ahead.

(Berry): Hey, J. D.? (Broadus): Yeah. (Berry): This is Charley, in Jackson, you know, work and ride. (Broa-

dus): Oh, yeah. (Berry): How are you getting along, all right? (Broadus): Oh, all right, sir, how are you doing? (Berry): Oh, I guess all right. *I feel as well as I did the last time.* We are having a little wet spell here. (Broadus) It hasn't rained a bit down here; it's still a bit dry. Why, did you want to come down? (Berry): Yeah, I think I'll pick that trailer up. (Broadus): What time are you going to pick it up, Saturday morning? (Berry): What time? (Broadus): About the same time. (Berry): Okay, I'll see you about 2:00 instead of later? (Broadus): Yeah. (Berry): I'll see you then about 2:00 o'clock. (Broadus): I'll be glad to loan it; I'll be glad to loan it, only call me. (Berry): Okay, I'll see you about 2:00 o'clock. (Broadus) Okay."

(CONCLUSION OF RECORDING)

APPENDIX C-1

TITLE 47 U.S.C.A. SEC. 605

Unauthorized Publication or Use or Communications:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication of having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any

part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, Secs 605, 48 Stat. 1103.

APPENDIX C-2

Title 28 Sec. 1254 (1) U.S.C.

Cases in the Court of Appeals may be received by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any Civil or Criminal Case, before or after rendition of judgment or decree;

APPENDIX C-3

Proposed Amended Rule of Criminal Procedure 32(f):

Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed.

APPENDIX C-4

AMENDMENT IV CONSTITUTION OF THE U.S.A.—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX C-5

AMENDMENT V—CONSTITUTION OF THE U.S. —CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infarmous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offen : to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 308

JEFFERSON DAVIS BROADUS AND JOE CURT COLEMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A–4) is reported at 317 F. 2d 212.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1963. A petition for rehearing was denied on June 27, 1963 (Pet. App. A–6, A–7). The petition for a writ of certiorari was filed on July 25, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court abused its discretion when, at a hearing on a motion for revocation of probation, it considered evidence as to additional misconduct of the same kind, not alleged in the motion to revoke.

STATEMENT

In the United States District Court for the Eastern District of Texas, an indictment was returned charging petitioner Broadus (under four counts) and petitioner Coleman (under one count) with possessing sugar with intent that it be used in making illegal liquor in violation of 26 U.S.C. 5601(a)(7), 5179(a). Both petitioners were charged under a fifth count with conspiring to defraud the United States of internal revenue taxes and to manufacture liquor in violation of the provisions of the Internal Revenue Code (R. 2–8). Petitioner Broadus, after waiving a jury, was convicted by the court; petitioner Coleman pleaded guilty (R. 18–22). Each petitioner was fined two thousand dollars, and sentenced, on the fifth count, to three years' imprisonment. Execution of the prison sentences was suspended for five years, conditioned on good behavior, and the petitioners were released on probation (R. 18–22).

Sixteen months later, in July, 1962, the probation officer petitioned the court to revoke petitioners' probation on the ground that they had continued to engage in the illegal liquor business (R. 22–24). A hearing was held in September, at which time the probation officer read to the court a second motion which specified in detail the acts of misconduct alleged to constitute violations of probation (Pet. App. A–1, A–2, R. 50–60). Petitioner Broadus, it was alleged, had made a sale of untaxed whiskey to a government agent (R. 50–53); petitioner Coleman, according to the motion, had been arrested in Mississippi for attempting to buy sugar and indicted in Alabama for

illegal sales of whiskey (R. 53–60). Copies of the motions were presented to petitioners (R. 62), who were granted a continuance of eight days to prepare a defense (R. 68). When the proceedings were resumed, the government produced a number of witnesses who testified concerning the sale by Broadus and the acts of Coleman which formed the basis of the charges against him (R. 173–179, 194–199, 208–214, 246–257). The court also heard evidence that petitioners had engaged in the operation of a whiskey still in Mississippi, an act not specifically charged in the motion of the preceding week (R. 111–113, 196–223, 236–239). Later in the proceedings, petitioner Broadus moved to suppress a tape recording of a telephone conversation he had with a government agent (R. 251). Decision on the motion was deferred until after the court had heard all the evidence, at which time it was granted (R. 32, 251). The court found the petitioners guilty of each of the alleged acts of misconduct, as well as participating in the operation of the still, and revoked the probations (Pet. App. A–3, R. 29–34). The court of appeals affirmed (Pet. App. A–4, 317 F. 2d 212).

ARGUMENT

1. The probation officer pleaded and proved that each petitioner violated probation by continuing to engage in the illegal liquor business (R. 22–24, 29–33). Specific acts of misconduct—all of them violations of the federal law—were alleged at the beginning of the hearing and proved to the satisfaction of the court (R. 29–33, 50–69). This proof was more

than sufficient to justify revocation of probation. The fact that there was additional evidence that petitioners had committed still other violations does not affect the validity of the action taken, at least in the present circumstances. Probation proceedings are not confined by the formal requirements applicable to a criminal trial. Moreover, the additional evidence in question related to offenses of the same kind and there can be no question that proof of any one of these offenses would have dictated the outcome.

Petitioner Broadus also contends that it was improper for the court to play a recording of a telephone conversation he had with a government agent, but a motion to suppress this evidence was granted by the court (R. 32). Manifestly, the court did not consider the recording in revoking probation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

AUGUST 1963.